

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2133

To be argued by
DENISE COTE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-2133

ROBERT J. ENRIGHT,
Petitioner-Appellee,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Docket No. 77-2133

ROBERT J. ENRIGHT,
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—V.—

UNITED STATES OF AMERICA,
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BRIEF FOR THE UNITED STATES OF AMERICA

Question Presented

Whether a Defendant Can Raise a Claim Under the Interstate Agreement on Detainers for the First Time in a Post-conviction Motion Pursuant to Title 28, United States Code, Section 2255.

Preliminary Statement

The United States of America appeals pursuant to Title 18, United States Code, Section 3731, from an order of the Honorable Charles M. Metzner, United States District Judge, entered in the United States District Court for the Southern District of New York on September 14, 1977, granting a motion made by Robert J. Enright pursuant to Title 28, United States Code, Section 2255, to dismiss Indictment 74 Cr. 1152 and to vacate his conviction thereon.

Indictment 74 Cr. 1152, filed in two counts on December 10, 1974, charged Robert J. Enright with armed bank robbery in violation of Title 18, United States Code, Sections 2113(a) and (d). On February 26, 1975, after a jury trial, Enright was found guilty of Counts One

and Two of the indictment; on March 26, 1974, he was sentenced to concurrent twenty-year terms of imprisonment. Enright's conviction was affirmed on appeal. *United States v. Enright*, Dkt. No. 75-1235 (2d Cir. October 22, 1975).

On February 1, 1977, Robert J. Enright filed a motion pursuant to Title 28, United States Code, Section 2255, making for the first time a claim under the Interstate Agreement on Detainers (hereinafter "the Agreement"), 18 U.S.C. App. (App. 1).^{*} On May 24, 1977, Judge Metzner ordered an evidentiary hearing on the issue of whether Enright had waived his rights under the Agreement. (App. 87). The hearing was held on June 13, 1977. (App. 123). On July 13, 1977, Judge Metzner issued an order granting Enright's motion. *Enright v. United States*, 77 Civ. 449 (S.D.N.Y. July 13, 1977). (App. 172). The United States then moved for reconsideration of that order. (App. 178). This motion was denied on September 14, 1977. (App. 207).

Statement of Facts

On October 30, 1974, a complaint was filed in the Southern District of New York charging Enright with bank robbery. (App. 10). The arrest warrant issued pursuant to this complaint was lodged on or about November 15, 1974, as a detainer against Enright with the Green Haven Correctional Facility, where he was then incarcerated for a parole violation. (App. 11). On December 10, 1974, Indictment 74 Cr. 1152 was filed in the Southern District of New York charging Enright with armed bank robbery. (App. 43). On December 24, 1974, a writ of *habeas corpus ad prosequendum* was issued to produce Enright in the Southern District of

^{*} "App." refers to the Joint Appendix in this appeal.

New York for arraignment on the indictment. (App. 16). Enright was produced in the Southern District pursuant to this writ on December 27, 1974, and on December 30, 1974, he appeared in United States District Court before the Honorable Thomas P. Griesa, represented by his retained counsel, Gordon Lang, and entered a plea of not guilty to the indictment. Subsequently, on January 24, 1975, Mr. Lang requested that Enright be returned to state custody pending his trial. The Government complied with this request and arranged for his return to Green Haven. The writ was ordered satisfied by the Honorable Marvin E. Frankel on January 24, 1975, and Enright was returned to Green Haven Correctional Facility on January 28, 1975. (App. 17, 43).

On February 20, 1975, a second writ of *habeas corpus ad prosequendum* was issued to produce Enright in the Southern District of New York to stand trial. (App. 21). Enright was returned to the Southern District pursuant to this writ and stood trial. On February 26, 1975, after a three day trial before Judge Metzner, a jury found Enright guilty on both counts. Judge Metzner sentenced Enright to concurrent twenty-year terms of imprisonment on March 26, 1974. Enright was returned to state custody on April 3, 1975. His conviction was affirmed by the Court of Appeals on October 22, 1975. At no point either during trial or on appeal did Enright raise any claim under the Agreement. (App. 43).

On February 1, 1977, Enright filed the present motion pursuant to Title 28, United States Code, Section 2255, raising for the first time his claim that the facts recited above constituted a violation of the Agreement, and that his conviction should be overturned on this ground. After receiving opposing papers from the Government, in which, *inter alia*, the Government contended that relief pursuan

to Section 2255 was unavailable (App. 45), Judge Metzner ordered that an evidentiary hearing be held to determine whether Enright had waived his rights under the Agreement. (App. 87).

The hearing was held on June 13, 1977. (App. 123). In an opinion issued on July 13, 1977, Judge Metzner found both that Enright had never requested to be returned to state custody prior to trial and that he was returned to state custody solely as a result of a request by his privately retained counsel, Mr. Gordon Lang. Judge Metzner also found that at the time Mr. Lang requested that Enright be returned to state custody pending trial in federal court, Mr. Lang represented he was conveying Enright's request to be returned to state custody. (App. 172, 173-74).^{*} Judge Metzner held that (1) the underlying facts constituted a violation of Art. IV(e) of the Agreement; (2) for a waiver of rights under the Agreement to be effective it had to be made by the defendant personally; and (3) Enright was entitled to relief under Section 2255 because the violation of the Agreement created a "jurisdictional defect." (App. 172).

The Government then sought reconsideration of the decision, urging, *inter alia*, that *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976), *cert. granted*, 46 U.S.L.W. 3183 (Oct. 4, 1977), in which the Court of Appeals for the Second Circuit held for the first time that a writ of *habeas corpus ad prosequendum* was a "detainer" and a "request" under the Agreement, should not be applied retroactively to transfers that antedated the decision. (App. 178-92, 204-06). This motion was denied by

^{*} See the contemporaneous memorandum of this request executed by Assistant United States Attorney Jeffrey Glekel on January 24, 1975. (App. 46).

Judge Metzner on September 14, 1977, on the ground that the detainer that the Government had lodged against Enright prior to the issuance of the writ bound the Government to the terms of the Agreement regardless of the *Mauro* decision. (App. 207).

A R G U M E N T *

A Claimed Violation of the Interstate Agreement on Detainers May Not Be Raised By A Motion Under Title 28, United States Code, Section 2255.

In the District Court, the Government contended that a claimed violation of the Interstate Agreement on Detainers may not be raised for the first time on collateral attack by means of a motion pursuant to Title 28, United States Code, Section 2255. (App. 47, 49). In his opinion of July 13, 1977, Judge Metzner resolved this issue against the Government. (App. 172). At the time of his ruling, this Court had not addressed the issue; indeed, in its only decision involving the invocation of the Agreement on collateral attack, the Court had expressly reserved the question, and decided the case on other grounds. *United States v. Chico*, 558 F.2d 1047, 1049 n.6 (2d Cir. 1977).

Since Judge Metzner's decision, however, this Court has expressly ruled that a claim under the Agreement cannot be raised for the first time on collateral attack. *Edwards v. United States*, Dkt. No. 77-2048, slip op. 123 (October 25, 1977). The *Edwards* decision, which was

* In a separate appeal, *United States v. Heimerle*, Dkt. No. 77-2119, the Government is seeking reversal of an order by the Hon. Robert L. Carter virtually identical to Judge Metzner's order in this case. Since the governing legal issue is the same, the Argument sections of this brief and the *Heimerle* brief are very similar.

also based on an appeal from a decision of Judge Metzner, is absolutely dispositive of this appeal, and we rely primarily upon it.

The facts in *Edwards* differ in only one significant respect from the facts here. Edwards, like Enright, was indicted for violations of federal crimes at a time when he was already in New York State custody. A federal warrant for his arrest had been lodged as a detainer with the state prison authorities, as it had been for Enright. Prior to trial on the federal charges, Edwards was brought on at least one occasion to the United States Courthouse in Foley Square and returned to state custody, in violation of Art. IV(e) of the Agreement, as interpreted by this Court in *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976), *cert. granted*, 46 U.S.L.W. 3183 (Oct. 4, 1977) and *United States v. Ford*, 550 F.2d 732 (2d Cir. 1976), *cert. granted*, 46 U.S.L.W. 3183 (Oct. 4, 1977).*

Unlike Enright, however, Edwards subsequently pleaded guilty to the federal charges against him, and was sentenced to a prison term on that plea. More than a year after his conviction, he claimed for the first time that the violation of Art. IV(e) of the Agreement required the dismissal of the indictment and the vacation of his conviction. Judge Metzner, who had presided at Edwards's guilty plea and who entertained the Section 2255 motion, denied the motion. He ruled that while a

* The Government continues to believe that both *Mauro* and *Ford* were wrongly decided. However, since the Supreme Court has taken *certiorari* in those cases to resolve the question of whether and the extent to which the Agreement governs the federal government's use of a writ of *habeas corpus ad prosequendum*, we are not at this time asking this Court to reconsider its previous decisions. See *United States v. Edwards*, *supra*, slip op. at 125, n.1.

claim under the Agreement might be raised on collateral attack, Edwards had waived his claim by pleading guilty.* On appeal, this Court expressly declined to adopt the reasoning of Judge Metzner; rather, it stated "[w]hile we have no quarrel with the ground on which Judge Metzner placed his decision, we think it preferable to affirm on the broader basis that a claim based on a violation of the [Agreement] is not within 28 U.S.C. § 2255." *Edwards v. United States*, *supra*, slip op. at 125. After reviewing the requirements for Section 2255 relief framed by the Supreme Court in *Hill v. United States*, 368 U.S. 424, 428 (1962) and *Davis v. United States*, 417 U.S. 333, 346 (1974), and considering recent decisions of this Court finding relief pursuant to Section 2255 inappropriate under facts more "appealing" than those presented by Edwards, see *Alfano v. United States*, 555 F.2d 1128 (2d Cir. 1977); *Del Vecchio v. United States*, 556 F.2d 106 (2d Cir. 1977), the Court concluded that a claimed violation of the Agreement did not constitute a "complete miscarriage of justice" or "exceptional circumstances." *Id.* at 127. Thus, it affirmed the denial of Edwards's motion.

The only significant difference between the *Edwards* case and this one is that although neither Edwards nor Enright raised the issue prior to conviction, Edwards pleaded guilty, while Enright proceeded to trial. Since the *Edwards* Court explicitly noted that the fact of Edwards's guilty plea was *not* the basis of its decision, and that it affirmed on the "broader basis" of unavailability of relief pursuant to Section 2255, this case is clearly governed by *Edwards*. It follows that Enright

* Since to Judge Metzner the crucial factor in the *Edwards* case was Edwards's decision to plead guilty, his denial of Edwards's motion was consistent with his action here.

was not entitled to the relief Judge Metzner granted him, and the order of the District Court should be reversed.*

* Since the concise *Edwards* opinion is dispositive, we will not burden the Court with either an extended argument concerning the non-availability of Section 2255 relief in these circumstances, or with alternative arguments why Judge Metzner's order should be reversed. For the interest and aid of the Court, however, we are reproducing in our Appendix our brief in the *Edwards* case. (App. 212). Point III of that brief, at pp. 13-19, contains a more extensive—although, in this case, unnecessary—discussion of the requirements of Section 2255 relief. In addition, Point II of the *Edwards* brief contains a separate argument that also applies to this case. For the reasons stated in that portion of the brief, we believe that even if Enright were permitted to invoke the *Mauro* decision on collateral attack, *Mauro* should not be applied retroactively to interjurisdictional transfers that antedated it.

In addition, under the peculiar facts of this case, the request by Enright's attorney that Enright be returned to state custody prior to his federal trial is a waiver of Enright's right to complain of that return as a violation of the Agreement. It is indisputable that a defendant's request to return to state custody effectively waives any objection under the Agreement to the return. *United States v. Ford*, *supra*, 550 F.2d at 742. A request by the defendant's attorney, particularly when the attorney represents he is conveying the defendant's own wishes, must necessarily have the same effect. See *Wainright v. Sykes*, — U.S. —, 45 U.S.L.W. 4807, 4812, n.14 (June 23, 1977); *Ennis v. Le Fevre*, 560 F.2d 1072, 1075 (2d Cir. 1977) and cases cited therein. Indeed, Edwards's attorney should not be permitted to "shift . . . his position . . ." during a collateral attack on the conviction. *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3790 (June 7, 1977). *Cf. Li Puma v. Commissioner*, 560 F.2d 84, 90 (2d Cir.), *cert. denied*, 46 U.S.L.W. 3218 (Oct. 4, 1977).

Since in *Edwards* the Court indicated that the unavailability of relief pursuant to Section 2255 was the preferable manner of disposing of this particular congeries of issues, we ask this Court to reverse on that ground. In the event that the Court disagrees with our analysis of the *Edwards* decision, we respectfully refer the Court to the alternative grounds for reversal contained in Point II of the *Edwards* brief and presented by Enright's attorney's explicit request to have the writ of *habeas corpus ad prosequendum* satisfied.

CONCLUSION

**The order of the District Court should be reversed,
and Enright's motion pursuant to Title 28, United
States Code, Section 2255 should be denied.**

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK)

DEAN M. SCHWARTZ, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 30th day of November, 1977 he served two copies of the within brief by placing the same in a properly postpaid franked envelope addressed: *→ within Appendix*

Martin Erdmann, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Courthouse
New York, New York 10007

And deponent further says that he sealed the said envelope and placed the same in the mailbox drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Dean M. Schwartz

DEAN M. SCHWARTZ

Sworn to before me this
30th day of November, 1977.

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
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Term Expires March 30, 1978